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No. 91-1666

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

INTERNATIONAL RESOURCES, INC.
and LARRY E. SMITH,

Petitioners,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.

Did International Resources, Inc. ("IRI") establish and maintain an employee welfare benefit plan under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA")?

2.

Does ERISA preempt the various state law causes of action as found by the District Court and affirmed by the Sixth Circuit?

PARTIES AND CORPORATE AFFILIATIONS

The parties to the proceedings below were Petitioners, International Resources, Inc. and Larry E. Smith, and Respondent, New York Life Insurance Company. New York Life Insurance Company has no parent or subsidiary corporation to report pursuant to Rule 29.1.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SUPPLEMENTAL STATEMENT OF CASE

New York Life Insurance Company ("New York Life") finds Petitioners' Statement of Facts inadequate and adds the following material facts omitted from or glossed over in Petitioners' Statement of Facts which are germane to the issues presented.[1]

The trial court decided the case on summary judgment, based on undisputed facts (Petition Appendix ("Pet. App.") pp.26a-30a; 35a-36a; 38a-46a).[2] These undisputed facts establish the following:

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[1] Citations are to the record before the Sixth Circuit and the factual findings of the courts below. New York Life does *not* concur in Petitioners' characterization of the policy provisions and evidence related thereto (Petition, p.10, n.3, p.5, n.1; p.6), but agrees the preliminary injunction issue is not before this Court.

[2] Insofar as Petitioners assert (Petition p.10, n.3) a question of fact existed, they did *not* assert this claim below nor argue that

IRI (a Tennessee Corporation doing business in Kentucky) maintains all the formal corporate requisites, conducts business and holds contracts with other companies in its own name (R. 59: Mem. Op. p.1; Pet. App. p.38a). Larry E. Smith was and is a salaried employee (the president) of IRI and has an employment contract with IRI. He is also a part-owner of IRI (*Id.;* Tr. 11, 20).[3]

In 1982, IRI decided to provide life, health and disability insurance for the avowed purpose and intent of providing automatic health benefit coverage for *all* of its employees[4] and all of their dependents (R. 33: Mem. Op. p.2; Pet. App. p.48a; Tr. 12, 52; Depo. L. Smith, pp.32, 36, 46, 48). IRI paid and has continued to pay the required premiums to maintain the health benefit coverage for its employees and their dependents (R. 59: Mem. Op. p.2; Pet. App. p.39a; Tr. 9-11, 13, 66; Depo. L. Smith, pp.36-37).

IRI's coverage plan was arranged through the GMS Trust (R. 33: Memo. Op. p.2; Pet. App. p.48a; Tr. 12-13). The GMS Trust is a Multiple Employer Trust, in which IRI was a participating employer (R. 33: Mem. Op. p.2; Pet. App. p.48a; Tr. 12-13, 67; Depo. L. Smith, Ex. 1). IRI executed a participation agreement with GMS designating GMS as IRI's agent for certain purposes and delegating to GMS

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inadequate time for discovery existed nor claim they had any additional, material evidence to present, even after the initial remand. The undisputed facts are sufficient to support the summary judgment entered.

[3] All references to the trial transcript ("Tr.") are to the testimony of Larry Smith at the preliminary injunction hearing. Facts upon which no finding was made by the trial court are taken from documents in evidence and depositions accepted as evidence (Tr. 75-6).

[4] The employees covered were all employees of IRI and their dependents, *not* just Petitioner Smith and his family (R. 59: Mem. Op., p.2; Pet. App. p.39a; Depo. L. Smith, pp.32-35, Ex. 1; Tr. 12, 52).

certain claims handling functions for the IRI plan (*Id.*; Depo. L. Smith, Ex. 1; Tr. 67).[5]

In 1982, the GMS/IRI plan was underwritten by Life Insurance Company of North America ("INA") (R. 33: Mem. Op. p.2; Pet. App. p.48a; Tr. 12-13). IRI received and distributed to its employees INA booklets describing the various benefits (accident, life and health) being provided (Tr. 14-15; P. Ex. 2-INA Booklet). IRI received an administration manual, enrollment forms and claims forms from GMS to assist employees with the filing of claims for benefits (Depo. L. Smith, p.47).

Plaintiff Smith's dependent son, P. Markham Smith, was totally disabled in May of 1983 (R. 33: Mem. Op. pp.2-3; Pet. App. p.48a; Tr. 6, 12, 16-18). In March or April 1983, the IRI/GMS welfare benefit plan was being underwritten by another insurer (Trans Pacific) which had succeeded INA (R. 33: Mem. Op. p.2; Pet. App. p.48a; Tr. 15). Trans Pacific adopted and continued coverage under the INA booklet (R. 33: Mem. Op. p.2; Pet. App. p.48a; Tr. 15-16, 22).

GMS transferred the underwriting of the GMS/IRI welfare benefit plan to a contract of insurance with New York Life effective March 1, 1986 (R. 33: Mem. Op. p.3; Pet. App. p.48a; Tr. 22-23). IRI, at its expense, continued to cover its employees and their dependents as covered participants in the plan (R. 59: Mem. Op. p.2; Pet. App. p.39a; R. 33: Mem. Op. pp.2-3; Pet. App. p.48a). IRI received and distributed to its employees, New York Life booklets setting forth the coverage and limitations of the plan and also received claims forms and an administration manual to assist with the

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[5] The agreement also specified that IRI acknowledged its responsibility for "compliance with . . . federal . . . disclosure statutes or regulations concerning benefit plans . . . ." (Depo. L. Smith, Ex. 1).

handling and processing of claims for benefits from New York Life (Tr. 8, 66; P. Ex. 1).

New York Life terminated its contract of insurance with GMS (D. Ex. 11), effective Sept. 30, 1988, pursuant to its terms[6] by and with the agreement of GMS, which issued notices of such termination to IRI and other employer participants (R. 33: Mem. Op. p.3; Pet. App. p.49a; Tr. 28-29, 37-35, 47-48, 54-55; P. Ex. 5-Aug. '88 New York Life letter; P. Ex. 7-Dec. 4, '87 New York Life letter; D. Ex. 9-July '88 letter; D. Ex. 11-GMS-New York Life policy, pp.40, 41). New York Life provided an additional twelve months of extended coverage benefits to the totally disabled son of Plaintiff Smith from the effective date of termination, September 30, 1988 (R. 33: Mem. Op. p.3; Pet. App. p.49a; Tr. 28, 55). It ceased paying benefits for claims incurred after September 30, 1989 (R. 33: Mem. Op. p.3; Pet. App. p.49a).

REASONS FOR DENYING THE WRIT

I.
There Is No "Special" Or "Important" Reason For Granting The Writ

Supreme Court Rule 10.1 provides that a review on the discretionary writ of certiorari will be granted "*only* when there are special and important reasons therefor . . ."

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[6] The New York Life booklets (P. Ex. 1) issued to IRI, and by IRI to its employees, including Plaintiff Smith (Tr. 8, 66), clearly provided in unambiguous language that (a) New York Life could terminate the insurance upon advance notice to the policyholder (GMS) (D. Ex. 11, NYL-GMS policy) without the consent of participants (P. Ex. 1, back of cover page and p.53) and (b) in the event of termination, a covered participant who was totally disabled would continue to receive extended coverage under the plan for a maximum of twelve months (*Id.* at pp.55-56).

(Emphasis added). Acceptable reasons for the extraordinary grant of a writ of certiorari include conflicting decisions of the United States Court of Appeals on the matter; a federal question conflict between a decision of a federal Court of Appeals and State Court of last resort; a conflict with an applicable decision of this Court; or a decision that "has so far departed from the acceptable and usual course of judicial proceedings, or a sanction of such a departure by a lower court, as to call for an exercise of this Court's power of supervision". U.S. Sup. Ct. Rule 10.1.

Petitioners argue the Sixth Circuit decision conflicts with the decisions of the Fifth Circuit and with certain state court decisions regarding the existence of an ERISA plan and that its preemption holding under ERISA is too broad and, thus, the Court should grant certiorari. This Court long has been "consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Lane v. Bowler Corp.*, 261 U.S. 387, 393 (1923). As demonstrated below there is no "real and embarrassing" conflict between the circuits. The Sixth Circuit's opinion on the existence of an ERISA plan and on ERISA preemption is consistent with the decisions of this Court and the uniform decisions of its sister circuits. There is no special or important reason for granting the writ.

II.

There Is No Conflict Among The Circuits And The Sixth Circuit's Opinion Is Consistent With The Opinions Of This Court As To The Requisites For The Formation Of An ERISA Plan

ERISA defines an employee welfare benefit plan as one "established or maintained . . . by an employer . . . for the purpose of providing for its participants or their beneficiaries, *through the purchase of insurance* or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death . . ." 29 U.S.C. § 1002(1) (emphasis added).[7]

The issue presented is whether IRI established and maintained an employee welfare benefit plan for the purpose of providing benefits to its employees. Contrary to Petitioners' assertions there is no conflict among the circuits. The Sixth Circuit's opinion[8] is consistent with the statute, the Department of Labor regulations issued thereunder,[9] the decisions of the other circuits, *including* the Fifth Circuit, and the decisions of this Court.

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[7] An "employer" is defined in 29 U.S.C. § 1002(5) and includes any person acting on behalf of the employer in relation to the plan. A "participant" is an "employee" eligible for benefits under the plan. 29 U.S.C. §§ 1002(6) & (7). Where benefits are provided through insurance, the employer is relieved of the necessity to establish a separate trust to hold the assets of the plan. 29 U.S.C. § 1103.

[8] The opinion is officially published at 950 F.2d 294 and is set forth in the Petition's Appendix, p.1a.

[9] The Secretary of Labor is given the responsibility for issuing regulations and enforcement under ERISA as to matters covered in this litigation. 29 U.S.C. §§ 1134 & 1135. As one of the agencies charged with the administration of the statute, its regulations and interpretations are entitled to substantial weight. *See, e.g., Mead Corp. v. Tilley*, 490 U.S. 714 (1989).

In *Ft. Halifax v. Coyne*, 482 U.S. 1 (1987), this Court addressed the essential requisites of a "plan" under ERISA. An ERISA plan is a systematic undertaking by an employer to provide benefits to its employees, including the ongoing funding for those benefits and an ongoing administrative mechanism to determine eligibility, process and handle claims. The facts in this case clearly demonstrate that IRI undertook and intended to establish and maintain a plan to provide ongoing welfare benefits to its employees through an administrative mechanism to process and pay ongoing claims. IRI participated in this mechanism by assisting employees in filing claims (it had the claims forms and an administrative manual for this purpose). By IRI's delegation, the GMS Trust also participated in this process (it processed and paid eligible claims submitted to it by IRI and its employees). The ongoing funding of this plan was provided by IRI.

The test utilized by the Sixth Circuit in determining an ERISA plan existed is consistent with the decisions of every other circuit which has considered the matter.[10] The test, first articulated in *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*), is a question of fact to be determined "from the surrounding circumstances . . . [to show] a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." The purchase of a group insurance policy covering all of the employer's employees is "substantial evidence that a plan . . . has been established." *Id.* The employer's intent to establish a plan is shown by its acts and ongoing involvement in the program. *Id.* at 1374; *Hansen v.*

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[10] Petitioners' assertion of conflict with the Fifth Circuit is erroneous. As discussed more fully, *infra*, the Fifth Circuit has adopted the standards enunciated in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*). *See Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990).

Continental Ins. Co., 940 F.2d 971, 976-78 (5th Cir. 1991); *Wickman v. Northwest Nat. Ins. Co.*, 908 F.2d 1077, 1082-83 (1st Cir.), *cert. denied*, 111 S. Ct. 581 (1990).[11] The involvement does not have to be significant; rather, only minimal involvement over that prescribed in the Department of Labor's safe harbor regulations is sufficient.[12] Indeed, the delegation of certain administrative functions to an insurer or a multiple employer trust for claims processing and determination is "perfectly in keeping" with an employer's intent in establishing and administering the plan. *See e.g., Kidder v.*

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[11] Petitioners' argument that certain state courts are split on the issue of whether an ERISA plan has been created does not warrant granting certiorari in this case. The question, as all the cases recognize, is factually based. Indeed, *Turnbow v. Pacific Mutual Life Ins. Co.*, 765 P.2d 1160 (Nev. 1988), *cert. denied*, 490 U.S. 1102 (1989), reflects this. The decision was predicated on an absence of evidence showing any intent on the part of the employer. The evidence here clearly reflects that IRI had the requisite intent. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Review of a particular view of law expressed by a state court on the issue should be on a decision from that court. The Sixth Circuit's decision here, on the undisputed facts presented to it, correctly states the law and is consistent with the decisions of this Court and the other circuit courts of appeal.

[12] 29 C.F.R. § 2510.3-1(j). The regulations are so called "safe harbor" regulations specifying certain limited actions an employer can take *without* establishing an ERISA plan. *See e.g., Hansen v. Continental Ins. Co.*, 940 F.2d at 977-78; *Brundage-Peterson v. Compcare Health Serv. Ins. Corp.*, 877 F.2d 509, 511 (7th Cir. 1989). Under the regulation's four part "safe harbor" test, no contributions by the employer can be made; participation in the program by the employees must be voluntary; the only functions the employer performs are to permit, without endorsement, the insurer to advertise its plan and to collect premiums from the employees and transmit them to the insurer, and employer must receive no compensation in connection with the program.

The undisputed facts in this case establish beyond doubt that the requirements of the regulation for exclusion from ERISA coverage are *not* met here.

H&B Marine, Inc., 932 F.2d 347, 353 (5th Cir. 1991); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 243 (5th Cir. 1990); *Brundage-Peterson v. Compcare Health Serv. Ins. Corp.*, 877 F.2d 509, 510-11 (7th Cir. 1989); *Kanne v. Connecticut Gen. Life. Ins. Co.*, 867 F.2d 489, 492-93 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3218 (1989) (employer delegation to third party multiple employer trust consistent with 29 U.S.C. § 1002(5)).[13]

Petitioners' argument based upon *Taggert Corp. v. Life & Health Benefits Admin., Inc.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981), is misplaced. Aside from the fact that the Fifth Circuit has adopted the *Donovan* analysis in *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, *supra*, the *Memorial* court clearly distinguished the *Taggert* decision. In rejecting the plaintiff's argument that only a "bare purchase" of group health insurance was involved, the *Memorial* court recognized that it is a common practice to provide health benefits through an insurance policy and that ERISA expressly encompasses such a practice. 904 F.2d at 240. *See also, Ed Miniat, Inc. v. Globe Life Ins. Co.*, 805 F.2d 732, 739 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *Credit Managers Ass'n v. Kennesaw Life & Acc. Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987). The evidence in *Memorial*, as does the evidence here, established the employer, through the mechanism of a multiple employer trust, secured insurance for the purpose of insuring its employees; that the policy booklet, issued to the employer,

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[13] Further, as this Court stated in *Ft. Halifax v. Coyne*, 482 U.S. at 18, n.10, the fact that the employer does not comply with ERISA's reporting and disclosure requirements does not avoid ERISA's application or mean that no ERISA program exists. *See also, Brown v. Ampco-Pittsburgh, Corp.*, 876 F.2d 546, 551 (6th Cir. 1989); *Gilbert v. Burlington, Ind., Inc.*, 765 F.2d 320, 328 (2d Cir. 1985), *aff'd summarily*, 477 U.S. 901 (1986); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Donovan*, 688 F.2d at 1373.

and by it to the employees, set forth the details of the benefits and conditions relating to coverage; procedures for filing claims were set forth, and the employer monthly paid part of the employees' cost of coverage. These facts establish an ERISA plan. *Id.* at 241.

In distinguishing *Taggert*, the *Memorial* court explained that *Taggert* involved an allegation that the multiple employer trust *itself* was an ERISA plan whereas the focus in a case such as this is on the employer and employees for whom coverage was being provided. "There is, thus, an employer-employee-plan relationship that was lacking in *Taggert*." *Id.* at 243. *See also*, *Kidder v. H&B Marine*, 932 F.2d at 353; *Kanne*, 807 F.2d at 492-93; *Donovan*, 688 F.2d at 1373.

Simply put, *Taggert* and other similar cases such as *Matthews 25 Ministries v. Corcoran*, 771 F.2d 21 (2d Cir. 1985) and *Wisconsin Educ. Ass'n Insurance Trust v. Iowa State Board*, 804 F.2d 1059 (8th Cir. 1986), do not involve the issue of whether an *employer* has established an ERISA plan.[14] Rather, the issue presented in those cases was whether the multiple employer trust *itself* was an ERISA plan. The circuit courts are uniform — the fact that the multiple employer trust is not an ERISA plan *does not* answer or address the question presented here. An employer (IRI) subscribing to a multiple employer trust can, and most often does, establish an ERISA plan. Petitioners' focus on the trust itself obfuscates the question but does not address it. *See, e.g.*, *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449,

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[14] Indeed, the analysis of the Eighth Circuit in *Iowa State Board* supports the conclusion that IRI's plan is covered by ERISA. The participants under IRI's plan are *its* employees. The requisite "nexus" underlying the *Iowa State Board* opinion is, thus, clearly present — the "common economic . . . interest, unrelated to the provision of benefits. An employee depends on his employer." 804 F.2d at 1063.

1452 (5th Cir. 1991) (trial court "misdirected its analysis" by focusing on the trust rather than the employer).[15]

The misfocus of Petitioners' argument is reinforced by the 1983 amendments to ERISA, P. L. 97-473, Title III, § 302, 96 Stat. 2612-13. Congress added the definition of a "multiple employer welfare arrangement," which expressly includes arrangements such as the GMS Trust. 29 U.S.C. § 1002(40). Amending 29 U.S.C. § 1144 in this regard, Congress narrowed the exemption for multiple employer welfare arrangements which were also employee welfare benefit plans from certain state insurance regulations. 29 U.S.C. § 1144(b)(6)(A). Congress also specifically recognized, 29 U.S.C. § 1144(b)(6)(C), that an employer could establish an employee welfare benefit plan under ERISA by "participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries." *See, e.g., MD Physicians & Assoc., Inc. v. State Board of Ins.*, 957 F.2d 178, 182 n.4 (5th Cir. 1992).

The undisputed facts, properly focusing on the correct entity — IRI, the employer — clearly demonstrate it was motivated in its action for a single reason — to provide medical care benefits to *all* its employees. IRI *intended* to provide the program. IRI intended to and did pay the costs

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[15] Petitioners' further argument that *Gahn* recognized state "remedies" were not preempted (Petition p.9, n.2), simply reads the decision out of context. At issue was a Louisiana statute mandating when and under what circumstances a policy's coverage could be canceled. The court held that statute to be within the savings clause, 29 U.S.C. § 1144(b)(2)(A), as mandating the substantive terms of the policy. The application of the statute, however, does not implicate that recovery for its violation is other than those provided by ERISA's exclusive remedial provisions, 29 U.S.C. § 1132. *See infra* for a fuller discussion.

of the coverage for *all* its employees. IRI *selected* the coverage and benefits to be provided. The participants and beneficiaries were known, as were the benefits, claims procedure and method of payment. IRI participated in the ongoing administrative functions of the plan. It established and maintained an ERISA welfare benefit plan. The decisions below are correct and there is no conflict among the circuits. The decisions below are consistent with the decisions of this Court and the regulations of the Department of Labor. The Petition for a Writ of Certiorari should be denied.

III.

The Sixth Circuit's Opinion On The Scope Of ERISA Preemption Is Consistent With The Decisions Of This Court And There Is No Conflict Among The Circuits Or The Highest State Courts Which Have Considered The Issue

ERISA "supersedes any and all State laws[16] insofar as they may now or hereafter relate to any employee benefit plan . . .," ERISA, 29 U.S.C. § 1144(a), but saves from preemption "any State law which regulates insurance, banking or securities." 29 U.S.C. § 1144(b)(2)(A). Petitioners argue that in finding all but one of their state law causes of action preempted, the Sixth Circuit carried this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), too far. Petitioners further rely on this Court's decision in *FMC Corporation v. Holliday*, ___ U.S. ___, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990), in support of their argument that their state law claims are saved under ERISA, 29 U.S.C.

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[16] For purposes of ERISA, 29 U.S.C. § 1144, " 'State Law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . . " 29 U.S.C. § 1144(c)(1).

§ 1144(b)(2)(A). Petitioners' argument simply ignores the full import of *Pilot Life* and its progeny.

Pilot Life held that, because the addition of state law remedies would destroy the delicate balancing of interests Congress had achieved when it determined which remedies should be available in ERISA benefit actions, state law remedies relating to claims for benefits under an ERISA plan would be preempted. 481 U.S. at 55-57.[17] That point was reemphasized by this Court's decision in *Ingersoll-Rand Co. v. McClendon*, ___ U.S. ___, 111 S.Ct. 478, 112 L.Ed. 2d 474 (1990), which held that although ERISA does not *expressly* preempt all state law remedies, under the doctrine of *implied* preemption, state "cause[s] of action w[ill] be preempted" if they "conflict [ ] directly with an ERISA cause of action." ___ U.S. at ___, 111 S.Ct. 484-85, 112 L.Ed. 2d at 486.[18] In reaching that conclusion, this Court noted that it had "examined [§ 502(a) of ERISA] at some length" in *Pilot Life*, and set forth, again, in its entirety the underpinning rationale it had previously stated:

> The detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of

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[17] Indeed, this Court made the point abundantly clear in distinguishing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), as that case "did not involve a state law which conflicted with a substantive provision of ERISA." *Pilot Life*, 481 U.S. at 57. Petitioners' reliance on *FMC* is misplaced for the same reason. Further, Petitioners simply misconstrue this Court's holding in *FMC*.

[18] A state law remedy conflicts with ERISA if it provides a remedy for rights "expressly guaranteed" by ERISA and exclusively enforced by § 502(a), 29 U.S.C. § 1132(a). ___ U.S. at ___, 111 S.Ct. at 486, 112 L.Ed. 2d at 488. The rights at issue in *Ingersoll-Rand* arose under § 510 of ERISA, 29 U.S.C. § 1140, which guarantees against interference with protected rights. *Id.*

> employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. 481 U.S. at 54 (quoting *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985)).

Ingersoll-Rand, ___ U.S. ___ at , 111 S.Ct. at 485, 112 L.Ed. 2d at 487 (emphasis in original).

In short, 29 U.S.C. § 1132, ERISA's remedial provision, has independent, "implied preemption" force. Where a state law seeks to supplant or supplement ERISA provided remedies, that state law is preempted. Petitioners' argument that some of its state law claims are not preempted simply ignores the overwhelming authority to the contrary. Each Circuit Court to address the issue, as well as the Supreme Courts of Texas, Louisiana and California have recognized this fact. *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992) (provision of Arizona insurance code dealing with conversion rights preempted); *Ruble v. Unum Life Ins. Co.*, 913 F.2d 295 (6th Cir. 1990) (state insurance code mandated benefit law but not state insurance law remedies saved); *Ramirez v. Intercontinental Hotels*, 890 F.2d 760 (5th Cir. 1989) (provision of Texas Insurance Code regulating deceptive and unfair trade practices preempted by ERISA); *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453 (10th Cir. 1989) (ERISA preempts Colorado bad faith insurance law); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989) (California statute prohibiting unfair insurance claims

processing preempted by ERISA); *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190 (8th Cir. 1988) (Missouri statute prohibiting vexatious refusal to pay insurance claims preempted by ERISA); *Anschultz v. Connecticut Gen. Life Ins. Co.*, 850 F.2d 1467 (11th Cir. 1988) (Florida statute providing private right of action to persons injured by violations of state's insurance code preempted by ERISA); *Cathey v. The Dow Chemical Co.*, 805 S.W.2d 387 (Tex. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2855 (1991); *Cramer v. Association Life Ins. Co., Inc.*, 569 So.2d 533 (La. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1391, 113 L.Ed. 2d 447 (1991) (remedial provisions of Louisiana Insurance Code preempted by ERISA);[19] *Commercial Life Ins. Co. v. Superior Court*, 253 Cal. Rptr. 682, 764 P.2d 1059 (1988), *cert. denied sub nom., Juliano v. Commercial Life Ins. Co.*, 490 U.S. 1075 (1989).

In this case, it is clear that ERISA, § 1132, provides a remedy for the asserted wrong. Under the implied preemption analysis of *Pilot Life* and *Ingersoll-Rand*, state law remedial provisions are preempted.

The issue in reality is whether the state laws upon which Plaintiff relies are in the nature of mandated benefit laws, which, as to an insured plan, may modify contrary plan terms. As the Sixth Circuit recognized (950 F.2d at 298, Pet. App. pp.6a, 10a), the remedy for violation of any such

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[19] Petitioners incorrectly rely on the Fifth Circuit's decision in *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449 (5th Cir. 1991), for the proposition that their state law claims survive preemption. The *Gahn* court actually found that all state law remedies sought by Plaintiff were preempted (damages under Louisiana abuse of rights doctrine). What was not preempted was a Louisiana statute that mandated the method by which a policy could be unilaterally canceled. La. Rev. Stat. § 22.213(B)(7). The remedy for a wrongful cancellation, however, is under ERISA. *Cramer*, 569 So.2d at 540-41. Petitioners' state law remedies here are likewise preempted.

law remains that provided in ERISA. *See, e.g., Ruble v. Unum Life Ins. Co., supra*; *Cathey v. The Dow Chemical Co., supra*; *Cramer v. Association Life Ins. Co., supra.*

Here, Petitioners contended below that four of their asserted state law causes of action fell within ERISA's savings clause (§ 1144(b)(2)(A)). 950 F.2d at 299, Pet. App. p.8a. The Sixth Circuit found one of these claims to be within the savings clause.[20] As to the remaining claims[21] Petitioners asserted to be within the savings clause, the court below rejected them. 950 F.2d at 299-300, Pet. App. pp.8a-10a. The court's analysis is correct, consistent with the decisions of this Court, the other circuit courts of appeal and the highest state courts which have considered the issue. *See* cases cited p.13, *supra.*

As the above-referenced decisions make clear, assuming some of the asserted claims meet the first step of the *Pilot Life* analysis — that under a "common sense view," the statutes at issue were intended to regulate insurance, under the second step, application of the three McCarran-Ferguson Act (5 U.S.C. §§ 1011, et seq.) factors, Petitioners' claims fall short.

This Court has adopted the McCarran-Ferguson Act test as a tool for determining when a state law "regulates insurance" within the meaning of ERISA's savings clause. *Pilot Life*, 481 U.S. at 48-49. Under this test, three criteria are

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[20] Insofar as Petitioners argued that K.R.S. § 304.118-110(5) (the Kentucky conversion policy revision) was saved, that issue is nor presented by the Petition because the Sixth Circuit found that statute to be within the savings clause. 950 F.2d at 300, 301, Pet. App. pp.10a-12a. New York Life, while disagreeing, has not sought Certiorari from this Court on the issue.

[21] Petitioners relied on the deceptive trade practices provisions embodied in the Kentucky Insurance Code, K.R.S. § 304.12-010, 020 and 230; an asserted tort of illusory insurance practices, and an asserted state law doctrine which prohibits cancellation of a policy once liability has attached.

evaluated to determine if a particular practice falls within the "business of insurance" and, therefore, "regulates insurance" within the meaning of ERISA's savings clause. *Pilot Life*, 481 U.S. at 47, 51; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 742-43. These three criteria are:

> *[F]irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

481 U.S. at 48-49 (emphasis in original) (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

First, none of the state law claims at issue have the effect of transferring or spreading a policyholder's risk. This factor is at the core of insurance. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Under *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. at 130-31, the risk is spread at the time the contract is entered into, not at a later time when issues over claims arise, such as in this case.

Second, the practice sought to be regulated by the Kentucky laws is not an "integral part" of the policy relationship. Rather, the laws are aimed at the remedies and standards of conduct required in administering the policy. They do not regulate the terms of the policy itself. *See, Insurance Board v. Muir*, 819 F.2d 408, 411-13 (3rd Cir. 1987).

The third McCarran-Ferguson Act factor is also not met in this case. Respondent submits that entities other than insurance companies (such as self-insured plans) participate in claims handling and decisions. Thus, the practice sought to be regulated — claims handling — is *not* limited to entities within the insurance industry and, thus, is not within the McCarran-Ferguson Act. This Court has explicitly so held. *Union Labor Life Ins. Co. v. Pireno, supra.*

Further, as this Court made clear in *Pilot Life*, and the court below and other courts have recognized, simply adopting a general common law principle and making it expressly applicable to an insurer is not the type of law which is specific to the insurance industry under the McCarran-Ferguson Act factors. *See, e.g., DeBruyne v. Equitable Life Assur. Soc.*, 920 F.2d 457, 469-70 (7th Cir. 1990); *Perkins v. Time Ins. Co.*, 898 F.2d 470, 473 (5th Cir. 1990); *McMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426, 429-30 (6th Cir. 1989).[22]

In short, the "laws" upon which Petitioners rely are not limited to entities within the insurance industry, the practices they seek to regulate are not the "business of insurance" but, rather, are a "business of insurers" and others and thus not within the McCarran-Ferguson Act. *Royal Drug*, 440 U.S. at 211. Accordingly, they are not saved from even the express preemption of § 1144(a) by the savings clause, much less from the implied preemption of § 1132. Thus, they were properly found preempted by ERISA by the courts below and the Petition for Writ of Certiorari should be denied.

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[22] Indeed, the Kentucky insurance code provisions upon which Petitioners rely are general deceptive trade practices provisions made applicable to insurers in a manner similar to the Texas scheme. *See, Cathey v. The Dow Chemical Co.* 805 S.W.2d 387 (Tex. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2855 (1991). The enforcement of these provisions is pursuant to a law of general applicability not limited to the business of insurance. K.R.S. § 446.070. *See, State Farm Mut. Auto Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988).

CONCLUSION

The questions that Petitioners raise are neither special nor important. The existence of an ERISA benefit plan in this case is well established under the undisputed facts. The legal precepts used by the Sixth Circuit are consistent with the decisions of this Court, the circuit courts and Department of Labor regulations. There is no "real and embarrassing conflict" warranting review. Similarly, the decisions below on ERISA preemption are consistent with the decisions of this Court, the circuit courts (among which there is no conflict) and the decisions of the highest state courts which have considered the issue. There is no substantial or important issue warranting review and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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